IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.10.2006

CORAM:
THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.NO.673 of 1993

1. S.Anbarasu
2. S.Mohanasundaram .. Appellants/Plaintiffs

-vs-

1. N.Sengottiyan
2. N.Nallamuthu
3. State of Tamil Nadu reptd
   by the District Collector,
   Erode.
4. The Taluk Excise Officer,
   Erode. .. Respondents/Defendants

This appeal is filed under Section 96 of C.P.C., praying for the relief as stated therein.

For appellant : : Mr.M.M.Sundaresh
For respondents : : Mr.V.Ravi
Addl.Government Advocate(CS)
R3 and R4
No appearance-R1 & R2

JUDGMENT

This appeal has been preferred against the decree and Judgment in O.S.No.402/1987 on the file of Principal Sub Court, Erode. The plaintiffs are the appellants in this appeal.

2. The short facts in the plaint sans irrelevant particulars for deciding this appeal are as follows:

The plaintiffs have filed a suit for partition of their 2/6th share in the plaint schedule properties. The plaintiffs are the brothers . The first defendant is the father of the plaintiffs. The second defendant is the younger brother of the first defendant. The plaint schedule properties are the ancestral properties of the plaintiffs and defendants 1 and 2. The plaintiffs are entitled to each 1/6th share in the plaint schedule properties. The second defendant is entitled to ½ share in the plaint schedule properties. The first defendant, who is the father of the plaintiffs was leading wayward life, after deserting the mother of the plaintiffs. The first defendant is an addict to drinks and gambling. In the panchayat held in the year 1976, two acres of land was allotted to the plaintiffs from out of the joint family properties towards their

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

maintenance. From that date onwards, the plaintiffs and their mother are living separately. The first defendant took an arrack shop in the Government Public auction in the year 1981 and he was liable to pay Rs.53,000/- every month towards tax. The first defendant was paying the said tax regularly for a period of three months which amounts to Rs.1,59,000/-. Since the licence to conduct the said arrack shop was not extended by the 3rd and 4th defendants, the first defendant could not continue the arrack shop business. Hence 3rd and 4th defendants to re auctioned the arrack shop No,4, which resulted in a loss of Rs.3,86,465/- to the Government. To set right the loss, 3rd and 4th defendant brought the plaint schedule properties on 16.10.1987 in a public auction . In spite of the objections made by the plaintiffs to the effect that their shares in the suit properties cannot be auctioned, the 3rd and 4th defendants ignoring the same, proceeded with the auction. The plaintiffs are entitled to each 2/6th share in the plaint schedule properties. Hence the suit.

3. The first defendant and the second defendant remained exparte.

4. The third and fourth defendants have filed a joint written statement contending that the suit is not maintainable and averments in the plaint paragraphs 4 and 5 are all cooked up stories, invented by the plaintiffs for the purpose of the case and that defendants 1 and 2 are residing along with their children as a Hindu Joint Family under the same roof. The plaint schedule properties are in the name of defendants 1 and 2 and they are in possession and enjoyment of the properties by paying land tax. There was no partition entered into between the members of the plaintiffs family as alleged in the plaint. The plaintiffs' father filed a writ petition in W.P.No.4748/83 and the same was dismissed by this Court on 24.2.1987, directing the first defendant to deposit Rs.1,93,232.50ps within eight weeks from 24.2.1987 and a charge has been created in respect of the said debt. Only to delay the above said payment, the first defendant had induced the plaintiffs to file the suit. There is no cause of action for the plaintiffs to file the suit. Hence the suit is liable to be dismissed with costs.

5. On the basis of pleadings, the learned trial Judge has framed four issues and on the basis of oral evidence of P.W.1, a preliminary decree for partition of plaintiffs 2/6th share was granted, creating a charge for the debt due to the fourth defendant in respect of plaintiffs 2/6th share in the plaint schedule properties. Aggrieved by the findings of the learned trial Judge, the plaintiffs have preferred this appeal.

6. Now the point for determination in this appeal is

" Whether the decree and Judgment in O.S.No.402 of 1987 is liable to be set aside for the reasons stated in the memorandum of appeal?

7.The Point :

When the appeal is taken up, the learned counsel appearing for the appellants would contend that he has practically no grievance with regard to the passing of a preliminary decree in respect of 2/6th share in the plaint schedule properties but the only grievance is that they are no way connected with the arrack shop business conducted by the first defendant

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

and that the charge created by the trial Court in respect of their share is not maintainable. The learned counsel would further contend that even if it is held that for the debt due to the fourth defendant Government is true,the entire suit property is liable to be proceeded with and the Government may be directed to proceed against the share of the first defendant in the plaint schedule properties at the first instance and then if it is found that the sale proceeds of the share of the first defendant is not sufficient to make out the debt, the fourth defendant may be directed then to proceed against the shares of the plaintiffs. For this course, there may not be any objection by the learned counsel appearing for the respondents. Under such circumstances, there is no merit in the appeal. The point is answered accordingly.

8 In fine, this appeal is dismissed confirming the decree and Judgment in O.S.No.402 of 1987 on the file of Principal Sub Court,Erode. The fourth defendant is directed to proceed against the share of the first defendant in the plaint schedule properties at the first instance and if the sale proceeds are not found to be sufficient to make out the debt then to proceed against the shares of the plaintiffs. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To

1. The Principal Sub Court,
Erode(With records)

2. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To The Government Pleader, SR.56734.
1 cc To Mr.M.M.Sundaresh, Advocate, SR.50892.

A.S.No.673/1993

GM(CO)
RVL 01.02.2007

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/